No. 20068

In the

United States Court of Appeals

For the Ninth Circuit

JIM GARVISON, G. E. CHINN, W. DON CAWOOD, CECIL SEAVEY, W. T. BOYD, H. C. RADATZ, CLIFFORD E. HINES and ROBERT E. DAVIS, TRUSTEES OF OREGON AND SOUTHWEST WASHINGTON PAINTERS PENSION TRUST FUND; E. W. SHIELDS, FRED PETERSON, EARL DILTS, JACK ROPER, W. T. BOYD, H. C. RADATZ, CLIFFORD E. HINES and ROBERT E. DAVIS, TRUSTEES OF OREGON AND SOUTHWEST WASHINGTON PAINTERS MEDICAL-HOSPITALIZATION TRUST FUND; PORTLAND AREA PAINTERS AND DECORATORS JOINT COMMITTEE, INC., a non-profit Oregon corporation; and LOCAL NO. 10 OF THE BROTHERHOOD OF PAINTERS, DECORATORS & PAPERHANGERS OF AMERICA, *Appellants,*

vs.

NORMAN A. JENSEN, *Appellee.*

APPELLANTS' BRIEF

Appeal from the United States District Court for the District of Oregon

HONORABLE JOHN F. KILKENNY, *Judge*

PAUL S. HYBERTSEN,
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Appellants,

vs.

NORMAN A. JENSEN,

Appellee.

APPELLANTS' BRIEF

Appeal from the United States District Court for the District of Oregon

HONORABLE JOHN F. KILKENNY, *Judge*

JURISDICTIONAL STATEMENT

This is a civil suit brought by the appellee to enjoin he appellants from enforcing the provisions of a colective bargaining agreement (Plaintiff's Ex. 1) and rom collecting contributions due to a Pension Trust ind a Medical Trust under the provisions of said agreenent. The "Agreed Facts" in the pretrial order show

that the appellee is an employer, party to said agreement, and that said contract was between employers engaged in an industry affecting commerce and unions representing employees in an industry affecting commerce (R. 62, 1. 10-11, 1. 16-18; R. 63, 1. 15-19). The pretrial order also shows that certain of the appellants are trustees, administering the Pension Trust Fund, and that, of these trustees, four represent employers and four represent employees (R. 62, 1. 22-25). The Medical-Hospitalization Trust, hereinafter referred to as "Medical Trust" is also administered by a board of trustees, four of whom represent employers, and the remaining four represent employees (Plaintiff's Ex. 4). The appellant trustees of each trust counterclaimed for the amounts due from appellee to the respective trusts.

The jurisdiction of the District Court was based upon the provisions of Sections 301 and 302 (e) of the Labor Management Relations Act of 1947, 29 USCA §185 and §186 (e) and this Court has jurisdiction to review the judgment by virtue of 28 USCA §1291. Judgment was entered by the District Court on February 2, 1965 (R. 85); notice of appeal was filed on March 3, 1965, accompanied by an appropriate bond (R. 97 and R. 99).

STATEMENT OF THE CASE

This case involves two typical trusts, created as a result of collective bargaining negotiations between em-

ployers and labor organizations representing their employees. The first is a Medical Trust, which has existed since 1953 (Plaintiff's Ex. 4, p. 2), and the second is a Pension Trust, which is more recent and which was created as a result of the 1962-63-64 collective bargaining agreement (Plaintiff's Ex. 1). The appellee is a painting contractor and is a party to said contract. Both trusts have been approved by the Internal Revenue Service (Defendant's Ex. 5 and 6). The Medical Trust Agreement (Plaintiff's Ex. 4) and the Pension Trust Agreement (Plaintiff's Ex. 2) permit the unions to cover their officers and other employees by making payments to the Trusts. The appellee contended, and the District Court found, that the aforementioned provisions of each Trust Agreement were illegal under the provisions of Section 302 (c) (5) of the Labor Management Relations Act of 1947, and that the practices followed by the trustees and the Unions in extending coverage to officers and other employees of the Unions were all illegal under this statute.

Commencing in 1958, the trustees of the Medical Trust extended certain benefits to retired painters who met certain minimum eligibility requirements, set forth hereinafter. The appellee contended, and the District Court found, that the extension of benefits to such retirees was not permissible under Section 302 (c) (5) of the Labor Management Relations Act of 1947. Conse-

quently, this case presents the following questions for determination by this Court:

(a) Whether it is permissible, under the provisions of Section 302 of the Labor Management Relations Act of 1947, 29 USCA §186, for a labor union to provide coverage for its employees, including its officers, by making payments to a jointly administered medical trust and to a pension trust.

(b) Whether it is permissible, under the provisions of Section 302 of the Labor Management Relations Act of 1947, 29 USCA §186, for a jointly administered medical trust to provide, through insurance, medical and hospital benefits for retired employees who were beneficiaries of the Plan prior to their retirement and upon whose work employer parties to the collective bargaining agreement had made payments to the Trust.

The appellee made payments to the two Trusts until April, 1963 (Tr. 123, 1. 13-15). The appellant trustees of each Trust counterclaimed for the amounts owed from the appellee to each Trust for the period from May 1, 1963, through August 31, 1964. The amounts of such contributions owed for that period are not in dispute (R. 63, 1. 20-31).

The case also involves the appellee's liability for liquidated damages to each of the Trusts, in accordance with the terms of the respective trust agreements (Plaintif's Ex. 2, pp. 11 and 12, and Plaintiff's Ex. 12, pp. 10 and 11), which agreements are incorporated by reference in the collective bargaining agreement (Plaintiff's Ex. 1).

STATUTE INVOLVED

Section 302 of the Labor Management Relations Act of 1947, 29 USCA §186, in relevant part, provides:

> "(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value —
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * *

(c) The provisions of this section shall not be applicable * * *

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That

(A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance;

(B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employ-

ees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and

(C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or

(6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds."

SPECIFICATIONS OF ERROR

1. The District Court erred in finding that the pro visions of the Pension Trust Agreement providing fo participation therein by Union officers and employee designated by the Unions and their actual participatio therein, and payment by the Unions to said Pensio Trust on their behalf, and receipt thereof by said Pen sion Trust were illegal and in violation of Section 30 of the Labor Management Relations Act, 29 USCA §186

2. The District Court erred in finding that the pro visions of the Medical Trust Agreement providing fo contributions by the Unions on behalf of officers an employees designated by the Unions, and the paymen by said Unions and receipt thereof by the Medical Trus were illegal and in violation of Section 302 of the Labo Management Relations Act, 29 USCA §186.

3. The District Court erred in finding that the prac tice of the Trustees of the Medical Trust in providin coverage for retired journeymen and their dependent was illegal and in violation of Section 302 of the Labo Management Relations Act, 29 USCA §186;

4. The District Court erred in finding that the bene fits provided for such retired employees and their wive were provided for by "extra assessments" now bein paid by employers.

5. The District Court erred in finding that the Ap-
ellee would be guilty of a criminal offense in making
ayments to the Pension Trust and to the Medical Trust.

6. The District Court erred in enjoining the trustees
f the Pension Trust from demanding, collecting, receiv-
ng or attempting to collect or receive from Appellee
ny money or contributions, and in failing to enter
udgment for said trustees of the Pension Trust in ac-
ordance with their counterclaim.

7. The District Court erred in enjoining the trustees
f the Medical Trust from demanding, collecting, re-
eiving or attempting to collect or receive from Appellee
ny money or contributions, and in failing to enter
udgment in favor of said trustees of the Medical Trust
n accordance with their counterclaim.

8. The District Court ererd in denying Appellants'
otion to amend the judgment.

SUMMARY OF ARGUMENT

Section 302 of the Labor Management Relations Act
f 1947, 29 USCA §186 does not prohibit unions from
roviding coverage for their officers and other employ-
es under medical-hospitalization trusts or pension trusts
hat are jointly administered by employer trustees and
mployee trustees in compliance with the statute. Un-
ons may be treated as employers for the purpose of

making appropriate payments to such trusts to provide such coverage, but the unions have no voice in the selection of employer trustees.

Health and welfare benefits may lawfully be provided by trustees of a jointly administered welfare trust to retired employees if such retired employees were covered under the trust prior to their retirement. The word "employees," within the meaning of Section 302, necessarily includes former employees of contributing employers, as well as presently active employees.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN FINDING THAT THE PROVISIONS OF THE TRUST AGREEMENTS AUTHORIZING COVERAGE OF UNION EMPLOYEES WERE ILLEGAL, AND IN FINDING THAT THE PRACTICES OF THE TRUSTEES AND THE UNIONS IN THIS RESPECT WERE PROHIBITED BY SECTION 302 (c) (5) OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947.

(a) Preliminary Statement and Background.

The leading precedents on this and the retired employee question now are the decisions of the Court of Appeals for the Eighth Circuit in *Blassie v. Kroger Co.*, ___ F2d ___, 59 LRRM 2034, and *Local 688, International Brotherhood of Teamsters v. Townsend*, ___ F2d

___, 59 LRRM 2048. These cases had not been decided, of course, at the time the District Judge rendered his opinion in the instant case. As a matter of fact, Judge Kilkenny relied in part upon the opinions of District Judge Harper in the *Blassie* and *Townsend* cases in arriving at the conclusion that coverage of union employees was improper under the statute. (See Opinion, R. 80, 1. 2-6.) The Court of Appeals for the Eighth Circuit reversed the District Court on both counts, holding that coverage of union officers and employees by a jointly administered trust did not violate the statute, and also holding that it was permissible to extend health and welfare benefits to retired employees who had been covered by the plan prior to their retirement. *Blassie v. Kroger*, supra, and *Local 688, International Brotherhood of Teamsters v. Townsend*, supra.

While the foregoing decisions are the leading authorities in this field, it is also interesting to note that in *Sanders v. Birthright*, 172 F Supp 895, 899, a welfare trust agreement provided that "Individuals eligible for group insurance are * * * (d) Employees of the Union, not herein otherwise specified." The District Court in that case noted that the trust agreement "* * * in all ways complied with the statutory requirements set out in Section 302 (c) (5) * * *."

In the instant case, the Pension Trust Agreement

(Plaintiff's Ex. 2, at p. 2) includes the following provision:

> "It is understood that the Union party to this agreement may be considered an employer hereunder if permitted by law or governmental regulations to be so considered with respect to employees directly employed by such Union in its own affairs; provided, however, that the Union shall be considered as an employer hereunder in such event for the sole purpose of being able to include its employees as beneficiaries of this Pension Plan and shall not be considered as an employer for purposes of the obligations and rights reserved to employers otherwise defined herein and, provided, further, that only union employees who occupy positions in which they directly participate in the furtherance of the business of the Union may be so included as distinguished from clerical or stenographic employees."

The testimony of Mr. Eggimann established that the Unions are paying to the Pension Trust on the same basis as painting contractors — i.e., at the rate of ten cents per hour worked by the union employees (Tr. 132, 1. 21, to Tr. 133, 1. 2), and that union employees are treated the same as employees of contractors under the Pension Plan (Tr. 131, 1. 6-15).

The Medical Trust Agreement (Plaintiff's Ex. 4, at p. 2) contains language practically identical to that above quoted from the Pension Trust Agreement with respect to the Unions' being treated as employers for the limited purpose of covering their employees. The

Medical Trust also provides, on page 2, for "Associate Employees", defining such employees as "employees of the Union and employees who are outside the bargaining unit represented by the Union and whom the Union or employer elects to cover on a uniform nonselective basis, as determined by the Trustees." Further the Medical Trust Agreement (Plaintiff's Ex. 4, at pp. 6 and 7) provides that the trustees shall have the power and duty to

> "(j) Establish and fix a monthly amount to be contributed to the fund for and on behalf of 'associate employees'. Such amount shall be commensurate with the insurance premium charged to provide insurance coverage for employees within the bargaining unit. The Union, however, may elect to make payments on an hourly basis in the same amounts as provided by the collective bargaining agreement for those employees who occupy positions in which they directly participate in the furtherance of the business of the Union, as distinguished from clerical or stenographic employees."

It is apparent that the Medical Trust permits the employers to cover employees other than painters by paying the monthly amount fixed by the trustees to the Trust. This, of course, is a common practice. The reason for the provision permitting the Unions to pay on their employees on an hourly basis rather than the monthly flat fee was explained by Mr. Herrle. As he testified (Tr. 104, 1. 7 to Tr. 105, 1. 12), when payments are

made on an hourly basis, a "reserve" of up to one thousand hours may be accumulated by the employee upon whom such payment is being made, while, if the flat fee method is used, no reserve is accumulated for the employee.

In summary, the Unions are permitted by the Medical Trust to cover their employees by paying the flat fee commensurate with the cost of insurance or they may pay the same hourly rate as painting contractors. If the flat fee method is used, the union employees do not accumulate any reserve, while if the other method is used, they may accumulate a reserve in the same manner as employees of painting contractors.

We have pointed out the foregoing features of the two Trusts to show that there is no advantage or favoritism given to Union employees over painters working at the trade. The practice of providing coverage for Union officers and employees under Health and Welfare and Pension Plans with the Union making appropriate payments to the Trusts is of course very common. This is understandable for obvious reasons. Union business representatives and financial secretaries come from the rank and file membership of the Union. If they were not serving the Union full-time, they would be working with the tools of the trade, and their employers would be making payments on their hours worked to the re-

spective Trusts. Consequently, as pointed out by Mr. Hill (Tr. 141, l. 21-25), if the Unions are denied the right to make payments to the Trusts while these individuals are working for the Unions, members would be discouraged from seeking such positions in their Unions. Clearly, Congress did not intend this result. It is well known that one of the reasons for the enactment of certain provisions of the Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Law, 29 USCA §§ 411-415) was to encourage democratic processes in union affairs. This objective certainly would not be served by making the Union positions less attractive by denying the individual members the same benefits which they would enjoy if they continued to work at the trade.

We submit that it makes no difference whatsoever whether the Union personnel, provided coverage under the Medical Trust or the Pension Trust, are considered as "officers" or not. See *Blassie v. Kroger*, supra at ___ F2 ___, 59 LRRM 2045. In any event, these persons are performing services for the Union and are paid by the Union for those services.

(b) The Union as an Employer.

There is no question but that a Union may qualify statutorily as an employer. In *Office Employes Interna-*

tional Union, Local No. 11, v. N.L.R.B., 353 US 313, the United States Supreme Court held that the conclusion that a union could be an employer under the statute was "inescapable" (353 US at 318). However, as pointed out by the court in *Blassie v. Kroger*, supra, at ___ F2d ___, 59 LRRM 2044, this does not mean that the Union has any voice in the selection of employer trustees. In the instant case, this conclusion is supported by the specific language in the respective trust agreements, the effect of which is to limit the rights of the Unions to the making of appropriate payments to the Trusts to provide coverage for their employees.

(c) Coverage of Union Employees Does Not Conflict with Congressional Purpose

There is absolutely no indication that Congress had in mind prohibiting the extension of coverage to Union officers and other Union employees by welfare or pension trusts in the manner that this is accomplished in the instant case. Congress did have certain evils or dangers in mind when enacting this legislation, in 1947. It appears that the immediate reason why Congress devoted its attention to this area was the demand by the United Mine Workers for a welfare fund that would be under the exclusive control of the Union, *United*

States v. Ryan, 350 US 299, 304-305; *Arroyo vs. United States*, 359 US 419, 426. It is clear that Congress feared "the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control;" it was also concerned that "such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain." *Arroyo v. United States*, supra, at 359 US 426. It is equally clear that Congress felt that these potential evils or abuses would be prevented by the provisions it did adopt, requiring that trust agreements specify the benefits to be paid and that there be joint administration of these trusts by employer trustees and employee trustees, with appropriate provisions to break deadlocks.

Certainly, permitting Union employees, including officers of the Union, to participate in health and welfare trusts and pension trusts on a basis no more favorable than that accorded to other employees in the bargaining unit does not constitute any part of an evil or abuse which Congress was seeking to overcome. On the contrary, we submit that to deny such Union employees the right so to participate would conflict with the express policy announced by Congress in 1959, as hereinabove suggested.

II.

THE DISTRICT COURT ERRED IN FINDING THAT THE EXTENSION OF CERTAIN BENEFITS TO RETIRED EMPLOYEES BY THE TRUSTEES OF THE MEDICAL TRUST WAS IN VIOLATION OF SECTION 302 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947.

(a) Preliminary Statement and Background.

The Medical Trust has existed since 1953, and prior collective bargaining agreements have provided for employer payments to this Trust. (See Defendants' Ex. 3, p. 15 — Area Agreement for 1959, 1960 and 1961, and Defendants' Ex. 4, p. 15 — Area Agreement for 1956, 1957 and 1958.) In 1958, the trustees of the Medical Trust obtained certain coverage for retired employees who met established minimum qualifications. These qualifying requirements are set out in the final rider to the 1963 insurance contract (Defendants' Ex. 1) and in the Booklet (Defendants' Ex. 16 at p. 22.) The minimum requirements for retired employees to be entitled to coverage were as follows:

1. He must have been insured under the group policy between the carrier and the Trust immediately preceding his date of retirement;

2. On his retirement, he must

(a) have attained at least 65 years of age;

(b) have completed at least 12 years of service in the industry after attaining the age of 45 years;

(c) have had at least 12 months of coverage as an active employee since January 1, 1955;

(d) be eligible for Social Security benefits;

(e) not be eligible for any benefits under the Fund other than as a retired employee.

Perhaps the most important feature of the foregoing ligibility provisions is that which requires "at least 2 months of coverage as an active employee since anuary 1, 1955;". This requirement, alone, means of ourse that the retired employee would have had sub-tantial payments made to the Trust by his employer or mployers prior to his retirement. Thus, the require-ient set forth by the Court in *Blassie v. Kroger*, supra, t ___ F2d ___, 59 LRRM 2043, to the effect that retired ersons provided coverage must have been employed by n employer who contributed to the Trust on their work fully satisfied.

(b) Qualified Retired Persons are "Employees" within Meaning of Statute.

Section 302 (c) (5) provides that the trust fund be

established "for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents, jointly with the employees of other employers making similar payments, and their families and dependents)." Like the District Court in the *Blassie* case, supra, the District Judge, here, considered that this language precluded the extension of health and welfare benefits to retired painters, even though they had previously been covered by the Plan through employer payments to the Trust. However, this reasoning is unsound because, as pointed out by the Court of Appeals, in *Blassie v. Kroger Co.*, supra, the statutory language does not mean that employee benefits are to be confined to the period of an employee's active employment. Obviously, some of the benefits recognized as permissible by the statute would not, by their very nature, be received while the recipient was an active employee. We refer here to unemployment benefits, disability and sickness or accident insurance, vacation pay, severance pay, and of course, pensions.

The Court of Appeals, in the *Blassie* case, at ___ F2d ___, 59 LRRM 2041, observed:

> "The trend of welfare plans toward the inclusion of retired persons is a fact of today's industrial life which needs no documentation here."

Also, in this connection, see "Health Benefit Plans
Under Collective Bargaining" (Defendants' Ex. 23) and
the Monthly Labor Review article on page 841 of De-
endants' Exhibit No. 15.

(c) Comparison with Internal Revenue Code and Regulations.

The language used in Section 302 (c) (5) of the
abor Management Relations Act of 1947 is almost
dentical with the provisions of the Internal Revenue
Code. Section 165 of the Internal Revenue Code of 1946
onferred a tax-exempt status upon a "trust forming
art of a stock bonus, pension, or profit-sharing plan of
n employer *for the exclusive benefit of his employees
r their beneficiaries* * * *." (Emphasis supplied) Under
his statute, the federal tax regulation then applicable
nade it clear that the word "employees" included
former employees." Regulations 111, Section 29.23,
p) 1, provided as follows:

> § 29.23(p)-1 *Contributions of an employer to an employees' trust or annuity plan and compensation under a deferred payment plan; in general.* [Emphasis in original.] Section 23(p) prescribes limitations upon deductions for amounts contributed by an employer under a pension, annuity, stock bonus, or profit sharing plan, or under any plan of deferred compensation. *It is immaterial whether the plan covers present employees only, or present and former employees, or only former employees.* Section 23(p) does not cover contributions which give the *em-*

ployee or former employee present benefits such as life insurance protection. The cost of such benefits is deductible to the extent allowable under this section 23(a). See § 29.165-6. [Emphasis supplied.]

Again this history was relied upon by the Court of Appeals in *Blassie v. Kroger Co.*, at ___ F2d ___, 59 LRRM 2042, wherein the Court stated:

> "Some precedent is perhaps afforded by the fact that those provisions in the Internal Revenue Codes which, for income tax exemption, require that a pension or welfare trust be 'for the exclusive benefit of his employees' have been administrativley interpreted to include former employees."

The Court also stated, at ___ F2d ___, 59 LRRM 2041

> 'Benefits after retirement are not an evil at which the statute was directed."

III.

THE DISTRICT COURT ERRED IN FINDING (R. 80, 1. 15 20) THAT BENEFITS PRESENTLY PAID TO RETIREES AND THEIR WIVES ARE PROVIDED FOR BY "EXTRA ASSESSMENTS" NOW BEING PAID BY EMPLOYERS

As we have shown, no retired painter is being provided benefits unless he has been a covered employe under the Plan prior to his retirement. Also, the ev

dence established that at the time of trial the Trust had a "surplus" of "a little over $200,000" (Tr. 96, 1. 25 to Tr. 97, 1. 4). The collective bargaining agreement (Plaintiff's Ex. 1, p. 27) provided for employer payments of 12 cents per hour worked by each employee until January 1, 1964, and for payments of 15 cents per hour for the remainder of the term of the agreement. There was absolutely no evidence produced that any moneys had been obtained by the Medical Trust by "extra assessments" levied on the employers. This would not have been possible under the collective bargaining agreement (Plaintiff's Ex. 1) or the Medical Trust Agreement (Plaintiff's Ex. 4) and we therefore respectfully submit that this finding was improper and should not have been made. We contend, of course, that in any event the validity of the providing of benefits to retirees under the qualifying requirements established by the trustees is perfectly clear.

IV.

THE DISTRICT COURT ERRED IN FINDING THAT IT WOULD BE A "CRIMINAL OFFENSE" FOR THE APPELLEE TO MAKE PAYMENTS TO THE MEDICAL TRUST AND THE PENSION TRUST, AND IN DENYING APPELLANTS' MOTION TO AMEND THE JUDGMENT.

Here, we contend, of course, that the provisions of the trust agreements in the particulars attacked by ap-

pellee were perfectly lawful and that employer payments called for by the collective bargaining agreement to each of the Trusts also are perfectly lawful. In addition, it would appear that the terminology used in the judgment (R. 87, 1. 1-6), in stating that the appellee "would be guilty of a criminal offense" in making the payments is improper, in that it amounts to a pre-judgment of the penal provisions of Section 302. Section 302 provides for penalties for *wilful* violations only. We submit that there was no occasion in this civil proceeding to make such a determination relative to the penal sanctions.

V.

THE DISTRICT COURT ERRED IN ENJOINING THE TRUSTEES OF THE PENSION TRUST AND THE TRUSTEES OF THE MEDICAL TRUST FROM COLLECTING PAYMENTS FROM THE APPELLEE, AND IN FAILING TO ENTER JUDGMENT IN FAVOR OF THE RESPECTIVE TRUSTEES OF EACH TRUST ON THEIR COUNTERCLAIMS

If the District Court was in error in finding that Section 302 was violated by permitting coverage of Union employees or by extending benefits to retired employees, the trustees of the two trusts automatically would be entitled to recover judgment on their counter-

claims. The amount due from the appellee to the appellant trustees of the Pension Trust for the period May 1, 1963, through August 31, 1964, was agreed to be $177.55 (R. 63, 1. 20-27). Similarly, it was agreed that if the appellant trustees of the Medical Trust were entitled to recover judgment against the appellee, the amount owed was $251.83 for the period from May 1, 1963, through August 31, 1964 (R. 63, 1. 27-32). The respective trust agreements provided for liquidated damages in the sum of $10.00 a month or 10% of the contributions owed, whichever is the greater, where employers failed to file reports or make payments to the Trusts (Plaintiff's Ex. 2, p. 11, and Plaintiff's Ex. 4, pp. 10-11). Here, the plaintiff admitted in the pretrial order that he had failed to file reports or make payments to either Trust since April, 1963 (R. 63, 1. 20-22). Consequently, under the formula above set forth, the appellee is liable to the trustees of each Trust in the sum of $160.00, as liquidated damages for the period involved.

CONCLUSION

In conclusion, the appellants respectfully submit that it is clear that neither the provisions of the two trust agreements permitting coverage of Union employees, nor the practices of appellants in this connec-

tion violate the statute; that it is also clear that the extension of benefits to qualified retired employees does not violate the statute; that therefore the judgment of the District Court should be reversed with respect to these matters and the cause remanded, with directions to enter judgment in favor of the appellant trustees on their counterclaims.

Respectfully submitted,

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Attorneys for Appellants.

I certify that, in connection with the preparation of his brief, I have examined Rules 18 and 19 of the Jnited States Court of Appeals for the Ninth Circuit, nd that, in my opinion, the foregoing brief is in full ompliance with those rules.

DONALD S. RICHARDSON
Of Attorneys for Appellants

APPENDIX

Page of Transcript of Record Showing Exhibits

Exhibit Number	*Identified*	*Offered and Received*
Plaintiff's:		
No. 1	10	10
No. 2	10	10
No. 3	10	10
No. 4	10	10
No. 7-A through 11-A	92	92
No. 13	85	86
No. 14	86	86
No. 15	87	87
No. 16	134	134
No. 25	133	133
No. 26	88	88
No. 27	88	89
No. 28 through 32	128	130
No. 33	134	134
No. 40	19	20
No. 41 through 43	11	12
No. 45 and 46	12	13
No. 48	161	162
No. 49	11	12
Defendants'		
No. 1	97	98
No. 2 and 2-A	135	136
No. 3	139	139
No. 4	140	140
No. 5	132	132
No. 6	99	100
No. 7	101	101
No. 8	100	100-101
No. 9 through 12	135	135
No. 14-A	124	124

No. 14-B	125	125	
No. 15	136	136-137	(as offer of proof)
No. 16	103	104	
No. 17 through 19	149-150	150-151	
No. 20	101-102	102	
No. 21	102	102-103	
No. 23	137	137	
No. 24	98-99	99	